

ATTACHMENT A

THE PROPOSED DECISION

**BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA**

In the Matter of the Appeal of Reinstatement from Disability

Retirement of:

MICHAEL D. LEMBERGER and

ANTIOCH UNIFIED SCHOOL DISTRICT, Respondents

Agency Case No. 2021-0174

OAH No. 2021060613

PROPOSED DECISION

Danette C. Brown, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on May 9, 2022, from Sacramento, California.

John Shipley, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Michael D. Lemberger (respondent) represented himself.

Respondent Antioch Unified School District did not file a Notice of Defense. The matter proceeded as a default against respondent Antioch Unified School District, pursuant to Government Code section 11520.

Evidence was received, the record closed and the matter was submitted for decision on May 9, 2022.

ISSUE

Did CalPERS establish that respondent is no longer substantially incapacitated from performing the usual duties of a Custodian for the Antioch Unified School District and should therefore be reinstated from disability retirement?

FACTUAL FINDINGS

1. Respondent was employed as a Custodian-School Services Building (Custodian) by the Antioch Unified School District (District) from approximately February 2001 to April 2016. Prior to that, he worked for the District as a substitute custodian for one year beginning in February 2000. On April 12, 2016, respondent suffered multiple injuries after his vehicle collided with a Ford F550 truck. On May 2, 2017, respondent signed and thereafter filed his Disability Retirement Election Application (application) on the basis of an orthopedic (bilateral knees) condition. On March 20, 2018, CalPERS approved the application, and respondent's disability retirement became effective immediately. CalPERS informed respondent that he would be reexamined periodically to verify his continued eligibility for disability if he were under the minimum age for service retirement. Respondent was approximately 36 years old at the time he submitted his application.

2. On March 25, 2020, CalPERS notified respondent it was reviewing his disability retirement benefits for continued eligibility. CalPERS requested respondent provide the Treating Physician Packet for completion by his physician, within 30 days, with his or her medical opinion on respondent's orthopedic (knee) condition. It was respondent's responsibility to ensure the requested information was received by CalPERS by April 24, 2020; otherwise, he risked his disability retirement being discontinued. If the medical information from the treating physician was insufficient, or if respondent had no treatment in the past year for his disabling condition, CalPERS would schedule an examination by an Independent Medical Examiner.

3. On April 4, 2020, respondent signed and thereafter submitted a Retiree Questionnaire for CalPERS Disability Re-Evaluation. In it, respondent indicated his condition has not improved, explaining "my knees are still painful and I can't kneel or lift heavy weight." Respondent did not feel he could return to his position because "[he] can't stand or walk for long periods of time. [He] can't lift heavy trash." With respect to his physical activity, respondent wrote "I don't do much physical activity."

4. On December 1, 2020, CalPERS notified respondent that it had completed its reevaluation of his continued eligibility for disability retirement and determined respondent was no longer substantially incapacitated from the performance of his duties as a Custodian with the District. CalPERS further informed respondent he would be reinstated to his former position.

5. On December 17, 2020, respondent timely appealed CalPERS's determination. On June 11, 2021, Keith Riddle, Chief of CalPERS's Disability and Survivor Benefits Division, signed and thereafter filed the Accusation in his official capacity, setting forth the basis for CalPERS's determination. Respondent timely filed a

Notice of Defense, and the matter was heard before an ALJ of the OAH, pursuant to Government Code section 11500 et seq.

Job Duties and Physical Requirements

6. The essential duties of a Custodian for the District are set forth in the duty statement. A Custodian maintains the cleanliness of the School Services Building and adjacent grounds by: mopping, sweeping, scrubbing, waxing and polishing floors; vacuuming and shampooing carpets; cleaning offices, meeting rooms, hallways, and other facilities; cleaning and disinfecting fountains and restrooms; refilling paper towel and soap dispensers; picking up debris from school grounds; operating cleaning equipment; locking and unlocking doors and gates; moving and arranging furniture as needed; and performing minor maintenance and repairs.

7. A CalPERS form entitled "Physical Requirements of Position/Occupational Title" sets forth the physical requirements for a Custodian for the District. A Custodian occasionally¹ performs the following activities: sitting; running; kneeling; climbing; squatting; bending (neck); reaching (above shoulder); reaching (below shoulder); pushing and pulling; fine manipulation; power grasping; keyboard use; mouse use; lifting and carrying up to 50 pounds; walking on uneven ground; driving; exposure to excessive noise; working with heavy equipment; exposure to excessive noise; extreme temperature, humidity, and wetness; working at heights; use of special visual or auditory protective equipment; and working with bio hazards.

¹ "Occasionally" is defined as up to three hours.

A Custodian frequently² performs the following activities: bending (waist); twisting (neck); and exposure to dust, gas, fumes, or chemicals. A Custodian constantly³ performs the following activities: standing; walking; twisting (waist), simple grasping; and repetitive use of hands. A Custodian never performs crawling, lifting over 50 pounds, and operating foot controls or repetitive movement.

Respondent signed and dated the form on March 15, 2017, and the District's Benefits Manager signed and dated the form on March 28, 2017.

Independent Medical Examination by Robert Henrichsen, M.D.

8. In June 2020, CalPERS sent respondent to Robert Henrichsen, M.D., for an Independent Medical Examination (IME). Dr. Henrichsen is a board-certified orthopedic surgeon. He received his medical degree from Loma Linda University in 1967, served in the U.S. Army from 1968 to 1970, and completed his residency in Orthopedics at Los Angeles Orthopedic Hospital in 1973. He has a long and distinguished career in orthopedic medical practice.

9. Dr. Henrichsen performed his IME of respondent June 16, 2020. In doing so, he interviewed respondent, conducted a physical examination, and reviewed respondent's medical records. He thereafter wrote an IME Report, dated June 16, 2020, and testified at hearing consistent with his IME Report.

10. Dr. Henrichsen described respondent's injuries resulting from his April 2016 automobile collision as follows: "multiple injuries with bilateral rib fractures, a left

² "Frequently" is defined as three to six hours.

³ "Constantly" is defined as over six hours.

pneumothorax, a fracture of the right hand, a fracture of the right patella and right proximal fibula, compound fracture of the left femur and left tibia and fibula." With respect to respondent's knee, "the right patella fracture had open reduction and internal fixation." Respondent explained to Dr. Henrichsen that he "did not have much follow up therapy," but Dr. Henrichsen opined that "the records suggest otherwise." Respondent reported his current symptoms as his knees feeling tight, weak, and stiff, he could not kneel or squat, and he felt "grinding and a feeling of cracking [and] popping" in both knees.

11. During the physical examination, Dr. Henrichsen found that respondent walked "with a normal tandem heel-to-toe gait," had "normal strength to stand on his heels and toes," and had "95 degrees of knee flexion" while squatting. Furthermore, respondent exhibited no radicular symptoms and his range of motion was as follows: "active straight leg raising 70/60 degrees," "knee range of motion is extension 0/0 degrees, flexion 135/140 degrees, ankle range of motion is extension 15/15 degrees and flexion 50/50 degrees." "The collateral ligaments of both knees and ankles are stable. There is no knee effusion." Dr. Henrichsen was "not able to identify any abnormal meniscal findings," though he noted the presence of patellar crepitus, a grinding or crunching sensation at the kneecaps.

12. Overall, Dr. Henrichsen opined that respondent had normal strength in his lower extremities, his feet had normal circulation without swelling or edema, the range of motion in respondent's lower extremities were normal, and respondent did not demonstrate atrophy due to lack of movement.

13. Dr. Henrichsen reviewed respondent's medical records, as well as respondent's non-medical records such as his job description and questionnaire for CalPERS Disability Re-Evaluation. He summarized all of respondent's medical records

from April 12, 2016, to January 24, 2018. The records consisted of respondent's medical treatment at the emergency room on April 12, 2016, radiology summaries of x-rays of respondent's left tibia and femur, pelvis, right tibia and femur, chest, right and left knees, right and left hands, CAT scans, lab work, psychiatric evaluation, occupational analysis, occupational therapy, a CalPERS disability form completed by Hailey Kirkpatrick, Nurse Practitioner, and a physician examination by Patrick McGahan, M.D., on January 24, 2018.

14. Dr. Henrichsen reviewed the x-rays of respondent's knees, which included "sunrise views of both patellofemoral joints." He opined:

These x-rays demonstrate the patellae articulating correctly with the distal femur without subluxation or lateral tilt. On the right side, there is some medial calcification on the medial patella and medial femoral condyle, but overall the joint space is reasonable and overt arthritic findings are absent.

Dr. Henrichsen made the following diagnoses: (1) history of auto collision; (2) multiple healed fractures both lower extremities; (3) healed multiple rib fractures; and, (4) chondromalacia right greater than left patella.

15. Dr. Henrichsen noted that when Dr. McGahan evaluated respondent, he opined that respondent "was not able to accomplish his work." Dr. Henrichsen noted the evaluation took place in 2018, just over two years prior to the current IME. He opined that respondent gradually had continued improvement in his mobility and strength during that time.

16. Dr. Henrichsen also noted that the CalPERS disability form completed by Nurse Practitioner Kirkpatrick "used pain as a reason for permanent disability." He explained that this did not satisfy the CalPERS's standard that "the disability needs to be based upon reasonable objective abnormal findings."

17. Upon reviewing the physical requirements of a Custodian, Dr. Henrichsen noted that climbing, squatting, and kneeling were "occasional" and that most of respondent's work was accomplished while standing, using hands and upper extremities. Dr. Henrichsen also reviewed respondent's job duties, noting that that the position occasionally required lifting and carrying up to 50 pounds, and that respondent told him that he would lift up to 75 pounds. Dr. Henrichsen found no evidence of nerve impingement, but noted evidence of previous fractures, "patellofemoral crepitus of both knees, more so on the right than the left in all medical probability because he had a compound right patella fracture."

18. Dr. Henrichsen concluded that respondent "does not demonstrate substantial incapacity for his occupational duties as a custodian for the [District]," and that respondent's x-rays did "not support ongoing substantial incapacity." With regard to any duties respondent would be unable to perform, Dr. Henrichsen opined that respondent has "occasional squatting and kneeling in his work" which he was "able to accomplish" during the physical examination. Finally, Dr. Henrichsen noted that respondent cooperated and did not appear to exaggerate his symptoms.

Respondent's Evidence

19. Respondent testified his knees hurt after standing for 20 minutes. He can no longer run. He must kneel to clean toilets, and kneeling is painful. He would have to climb a ladder to change light bulbs, which would also be painful. He cannot push a

cart uphill or downhill, and cannot lift heavy objects because his knees are too weak. Respondent believes that if he returns to work as a Custodian, he will get injured.

20. Respondent's mother, Diana Lemberger, testified on respondent's behalf. She stated that she and respondent work together in the yard, and that respondent cannot work longer than 40 minutes, as he is unsteady on his feet. She believes that he does not have the stamina to perform his work as a Custodian due to his weak knees.

Analysis

21. To be substantially incapacitated, there must be competent medical evidence that respondent cannot perform the usual and customary duties of a custodian. Dr. Henrichsen testified credibly that respondent is not substantially incapacitated to perform his job duties based upon his physical examination of respondent and his review of respondent's medical records. Other than his testimony and that of his mother, respondent did not provide competent medical evidence to the contrary.

22. When all the evidence is considered, the opinion of Dr. Henrichsen that respondent is not substantially incapacitated from performing the usual duties of a Custodian was persuasive. Dr. Henrichsen is a board-certified orthopedic surgeon and has specialized knowledge from an orthopedic standpoint, having those skills, experience, and knowledge concerned with conditions involving the musculoskeletal system.

23. Respondent's complaints of continued pain in his knees and fears of future injury are not supported by any objective findings, and are insufficient to establish substantial incapacity. In the absence of sufficient competent medical findings to support respondent's pain complaints, it cannot be found that respondent

is substantially incapacitated from performing the usual duties of a Custodian. (*Peter Kiewitt Sons v. Industrial Accident Commission* (1965) 234 Cal.App.2d 831, 838 [“Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a commission finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence”].)

24. CalPERS bears the burden of establishing that respondent is no longer substantially and permanently disabled from performing the usual duties of a Custodian. CalPERS presented sufficient competent medical evidence to meet its burden of proof. Consequently, its request that respondent be reinstated from disability retirement should be granted.

LEGAL CONCLUSIONS

1. CalPERS has the burden of proving respondent is no longer substantially incapacitated from performing the usual duties as a Custodian. (Evid. Code, § 500 [“Except as otherwise provided by law, a party has the burden of proof as to each fact the existence of nonexistence of which is essential to the claim for relief or defense that he is asserting.”].) Evidence that is deemed to preponderate must amount to “substantial evidence.” (*Weiser v. Bd. of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be “substantial,” evidence must be reasonable in nature, credible, and of solid value. (*In re Teed’s Estate* (1952) 112 Cal.App.2d 638, 644.)

2. In accordance with Government Code section 21192, CalPERS re-evaluates members receiving disability retirement benefits who are under the minimum age for service retirement. That section, in relevant part, provides:

The board . . . may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination The examination shall be made by a physician or surgeon, appointed by the board. . . . Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency . . . where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

3. Government Code section 21193, governing the reinstatement of a recipient of disability retirement who is determined to no longer be substantially incapacitated for duty, provides, in relevant part:

If the determination pursuant to Section 21192 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled immediately, and he or she shall become a member of this system.

4. Government Code section 20026 defines "disability" and "incapacity for performance of duty," as follows:

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion.

5. In *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876, the court interpreted the term "incapacity for performance of duty" as used in Government Code section 20026 (formerly section 21022) to mean "the *substantial* inability of the applicant to perform his usual duties." (Italics in original.) In *Hosford v. Board of Administration of the Public Employees' Retirement System* (1978) 77 Cal.App.3d 854, 862 the court held that a disability or incapacity must currently exist and that a mere fear of possible future injury which might then cause disability or incapacity was insufficient. Moreover, discomfort, which may make it difficult to perform one's duties, is insufficient to establish permanent incapacity from performance of one's position. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207, citing *Hosford v. Bd. of Administration, supra*, 77 Cal.App.3d 854, 862.)

6. As set forth in Findings 8 through 18, and 21 through 24, CalPERS met its burden of proof that respondent is no longer substantially incapacitated from performing the usual duties of a Custodian. Consequently, CalPERS' request that respondent be reinstated from disability retirement should be granted.

ORDER

CalPERS' determination that respondent Michael D. Lemberger is no longer disabled or substantially incapacitated from the performance of the usual duties of a Custodian due to an orthopedic (bilateral knees) condition is AFFIRMED. Respondent's appeal is DENIED.

DATE: June 8, 2022

Danette C. Brown

DANETTE C. BROWN

Administrative Law Judge

Office of Administrative Hearings